SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1894~~ 164

POTOMAC NEWS COMPANY,
Claimant of 56 cartons containing
19,500 copies of magazines
entitled "Hellenic Sun"
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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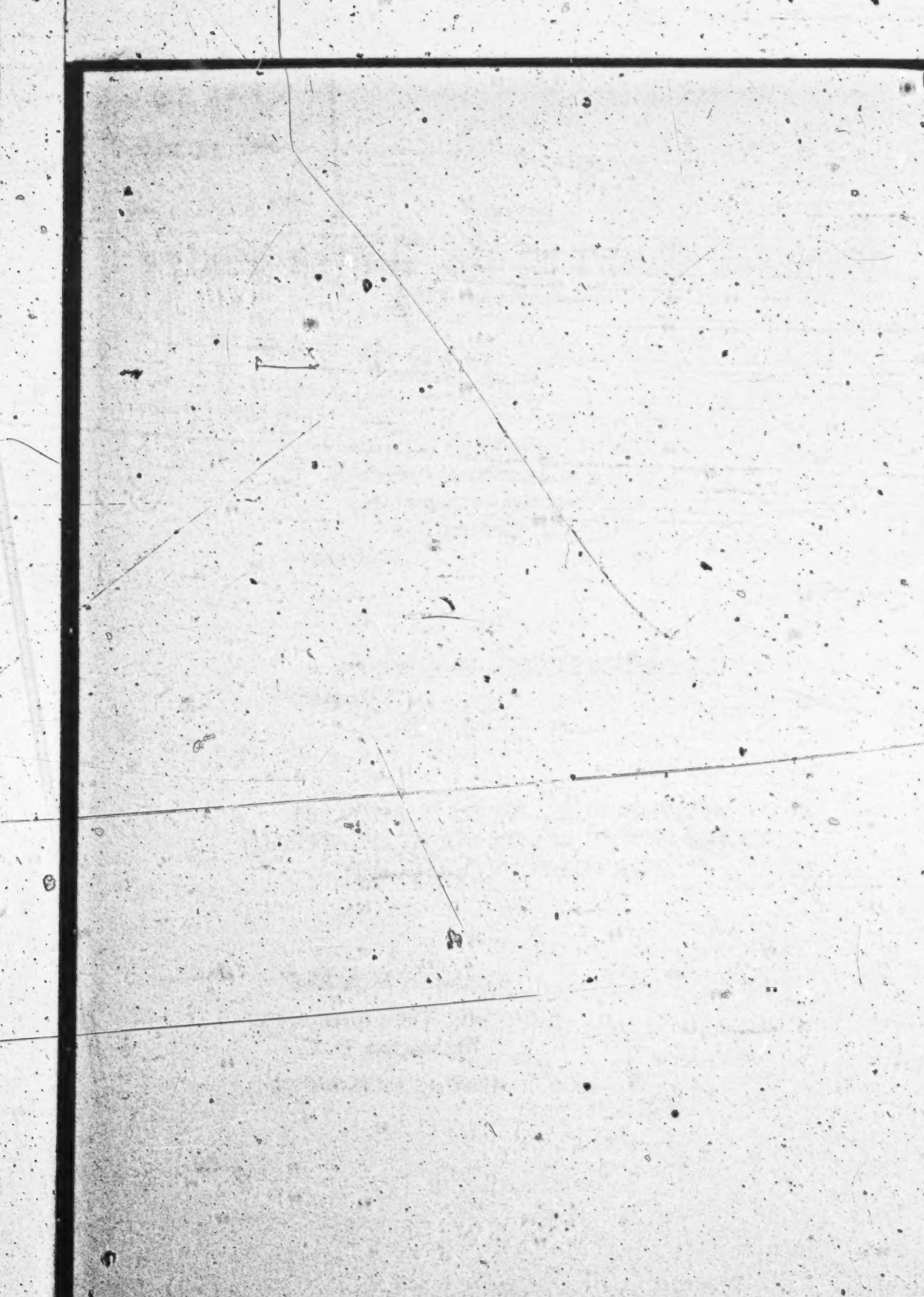

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

The Supreme Court of the United States of America has jurisdiction pursuant to Title 28, United States Code, Section 1254, (1).

OPINIONS BELOW

The United States District Court for the District of Maryland, Sitting in Admiralty, rendered its decision, 253 F. Supp. Page 498, which decision was affirmed by the United States Court of Appeals for the Fourth Circuit, on February 16, 1967, 373 F.2d 635.

QUESTIONS PRESENTED

1. Is Title 19, United States Code, Section 1305, unconstitutional upon its face as permitting a prior restraint upon literature, in violation of the First Amendment to the Constitution of the United States of America or were the procedures followed by the United States Customs Department, under Title 19, United States Code, Section 1305, in seizing the cartons of magazines herein and either negligently or willfully withholding said magazines for a period of fourteen days prior to the filing of the Libel Complaint herein, and twenty-seven days prior to any adversary hearing in the United States District Court for the District of Maryland, in violation of the First Amendment to the Constitution of the United States of America, by effecting a prior restraint?

2. Did the United States District Court for the District of Maryland deny the Petitioner its property, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States of America, when it denied the Petitioner a jury trial, in violation of the Seventh Amendment to the Constitution of the United States of America?

3. Are nudist magazines, intended for homosexual purchasers, protected by the First Amendment to the Constitution of the United States of America when they are not "utterly" without socially redeeming value or literary merit?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

AMENDMENTS TO THE CONSTITUTION

[Amendment I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

TITLE 19, UNITED STATES CODE

§ 1305. Immoral articles; prohibition of importation

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or

drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *Provided,* That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: *Provided further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector.

Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT OF FACTS

On March 4, 1966, a shipment of 56 cartons containing approximately 19,500 magazines entitled "Hellenic Sun No. II" was imported into the United States by the Petitioner, through the port of entry at Baltimore, Maryland and assigned Customs entry number 16518. Customs duties on these magazines were paid by the Petitioner on March 4, 1966. The magazines remained on the docks through the negligence of the contract drayman for the Customs Department until March 10, 1966, when they were delivered to the Appraisers Storehouse of the Bureau of Customs. The Customs examiners did not refer the magazines to the United States Attorney's office, until March 16, 1966. Two days thereafter, on March 18, 1966, the United States Attorney for the District of Maryland filed a Libel Complaint, and on that same date the Petitioner, unaware of the filing

of the Libel Complaint, filed a Complaint for an Injunction, against the Customs Department, in the United States District Court for the District of Maryland. On March 18, 1966, at the request of the Respondent, the United States District Court for the District of Maryland, signed an Ex-Parte Show Cause Order of Publication, returnable April 7, 1966. The Petitioner answered the Libel Complaint on March 24, 1966, and demanded a trial by jury.

The Petitioner filed a Motion to Dismiss the Libel Complaint and the Respondent filed a Motion to Dismiss the Injunction Complaint and both Motions were consolidated for hearing, and a Stipulation of Facts was entered on April 1, 1966. At no time was the Petitioner advised by the Court, or by counsel for the Respondent, that the Court intended to decide all of the issues at that time upon the Cross-Motions to Dismiss. The United States District Court for the District of Maryland, on April 5, 1966, entered its opinion declaring that the magazines in controversy were obscene and on April 14, 1966 that Court, over the objection of the Petitioner, signed an Order decreeing the destruction of the subject magazines herein. Appeal was taken by the Petitioner to the United States Court of Appeals for the Fourth Circuit and on February 16, 1967 the decision of the United States District Court for the District of Maryland was affirmed.

REASONS FOR ISSUING THE WRIT

FIRST: Is Title 19, United States Code, Section 1305 unconstitutional upon its face as permitting a prior restraint upon literature, in violation of the First Amendment to the Constitution of the United States of America or were the procedures followed by the United States Customs Department, pursuant to Title 19, United States Code, Section

1305, in seizing the cartons of magazines herein and either negligently or willfully withholding said magazines for a period of fourteen days prior to the filing of the Libel Complaint herein, and twenty-seven days prior to any adversary hearing in the United States District Court for the District of Maryland, in violation of the First Amendment to the Constitution of the United States of America, by effecting a prior restraint?

Petitioner urges this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and to declare Title 19, United States Code, Section 1305, unconstitutional since it permits, produces, and does not prevent or prohibit a prior restraint upon literature, in violation of the First Amendment to the Constitution of the United States of America. In the United States District Court for the District of Maryland, the Court relied upon the reorganization of the Customs service in upholding the Constitutionality of the Code provision, after stating, in its memorandum opinion, that the time spent after entry of the magazines and before they were delivered to the Appraisers' Storehouse, "does seem long." At the hearing of the Cross-Motions to Dismiss, the same Judge stated that the eight day delay involved was "too long". The procedures followed in this case were actually expeditious through the efforts of the Petitioner and through no fault of the Customs Department, since the Show Cause Order of Publication, issued Ex-Parte upon the request of the Respondent, and signed by the Court on March 18, 1966, only required the appearance of a claimant to the magazines by April 7, 1966, to Show Cause why the forfeiture should not be decreed. The Petitioner through counsel, had been attempting to pry its magazines out of the grip of the Customs Department since March 4, 1966, and filed an Answer to the Libel Complaint, as soon as the Petitioner was advised of the Libel Complaint. Actually the Answer to the Libel

Complaint was filed approximately two weeks prior to the date set in the Show Cause Order. There are no safeguards contained in Title 19, United States Code, Section 1305, which establish any time schedule for the Customs Department to act, prior to submission of material to the United States Attorney's office for Libel action, nor for the United States Attorney to proceed thereafter. There are no safeguards or a time table established for the setting of a case for adversary judicial hearing, and determination by the Court, as was sustained by this Court in *Kingsley v. Brown*, 354 U.S. 436. The door to unconstitutional prior restraint is left ajar by this statute. The procedures followed in this case performed an unconstitutional prior restraint upon the Petitioner's materials, in violation of the First Amendment to the Constitution of the United States of America. The literature in question was received in the port of Baltimore on March 1, 1966 and Customs duties paid thereon, by the Petitioner, on March 4, 1966. Thereafter the cartons of magazines remained in the custody of the Customs Department, through alleged negligence until March 10, 1966, when they were delivered to the Appraisers Storehouse by a contract drayman. Thereafter the cartons of literature remained in the custody of the Customs Department, as an intentional restraint, until samples were delivered to the United States Attorney on March 16, 1966, for institution of Libel proceedings. During the period from March 4, 1966, until March 18, 1966, the Petitioner through its attorney, was attempting to obtain the release of the cartons of magazines from the Customs Department. A delay of two weeks was required for the Customs Department to make a fifteen minute inspection and decision. On March 24, 1966, the Petitioner moved to dismiss the Libel Complaint, which Motion was expeditiously set for hearing on April 1, 1966, by the United States District Court for the District of Maryland, which Court rendered its memorandum opinion deci-

sion four days after argument on the Motion. Nine days thereafter, over the objection of the Petitioner, the United States District Court for the District of Maryland entered its Order, decreeing the destruction of the literature involved herein, without delaying the proceedings to have a trial on the merits. Even at this accelerated rate the total time consumed from date of filing the Libel action was one month, and the total elapsed time from date of entry exceeded six weeks. All of which the Petitioner alleges was unreasonable and in violation of the Petitioner's rights, guaranteed by the First Amendment to the Constitution of the United States of America.

SECOND: Did the United States District Court for the District of Maryland deny the Petitioner its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America, when it denied the Petitioner a jury trial, in violation of the Seventh Amendment to the Constitution of the United States of America?

Petitioner, in an effort to pry its magazines out of the grip of the Customs Department, on March 18, 1966 filed a Complaint requesting an injunction against the Customs Department. On that same date, unknown to the Petitioner, the Respondent had filed a Libel action requesting the destruction of the magazines in question. Petitioner answered the Libel Complaint on March 24, 1966, and demanded a trial by jury on the First Amendment issues contained in the Libel action, as provided by Title 19, U.S. Code, Section 1305. On that date the Petitioner also filed a Motion to Dismiss the Libel action. The Respondent also filed a Motion to Dismiss the Petitioner's Complaint for Injunction and on April 1, 1966, the United States District Court for the District of Maryland consolidated the two Motions for hearing. The Petitioner opened the hearing on the Motions with oral arguments, followed by oral argument and pres-

entation of additional evidence, by the Respondent. The hearing was concluded with oral argument from the Petitioner. At no time did any of the parties act as if they were engaged in a trial on the merits, and nothing was ever said to the Petitioner by the Court, or by counsel for the Respondent, to request the Petitioner to join in any Summary Judgment proceedings or waive its constitutional right to a trial on the merits. Petitioner has a Constitutional right to a trial by jury on the issue of obscenity under the First and Seventh Amendments to the Constitution of the United States of America. Petitioner has the Constitutional right not to be deprived of its property, without due process of law, under the Fifth Amendment to the Constitution of the United States of America. These are Constitutional rights which cannot be unknowingly waived. In the Opinion of the United States Court of Appeals for the Fourth Circuit, it is asserted that Petitioner made no request for a jury trial. Petitioner's written demand for a jury trial was filed on March 24, 1966. Petitioner knows of no other way to demand a trial by jury under the Federal Rules of Civil Procedure. Having once formally demanded a trial by jury, can the deprivation of the Petitioner's property be upheld without any trial whatsoever? In the Opinion of the United States Court of Appeals for the Fourth Circuit, it is asserted that the Petitioner acquiesced in the proposed Order calling for the destruction of the Petitioner's property. The Order, on its face, contains the hand written objections of the Petitioner's counsel who struck through the phrase "approved as to form" and inserted the phrase "Objected to". This was apparently ignored by the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit, but it remains to be seen by those who choose to look. How could the Petitioner be expected to request a continuance for an opportunity to offer additional testimony at a later date when the Petition-

er expected the jury trial to be held at a later date and was never advised, and was totally unaware, that the Court intended to summarily decide all of the issues without hearing evidence or testimony on the vital Constitutional question of obscenity, to wit: whether the material was "utterly" without socially redeeming ideas and devoid of literary merit, *Roth v. United States*, 354 U.S. 476, *One Inc. v. Olesen*, 355 U.S. 371, *Manual Enterprises v. Day*, 370 U.S. 478; *Memoirs v. Massachusetts*, 383 U.S. 413. Shall the Courts below, in their over-zealous desire to destroy literature, obviously distasteful to the majority point of view of our population, be permitted to disregard all legal precedent and Constitutional guarantees, in an effort to suppress a minority viewpoint.

THIRD: Are nudist magazines, intended for homosexual purchasers protected by the First Amendment to the Constitution of the United States of America when they are not "utterly" without socially redeeming value or literary merit?

The United States District Court for the District of Maryland, found that the magazine "Hellenic Sun No. II" was obscene, even though it contained socially redeeming ideas, *Roth v. United States*, 354 U.S. 476, and was not "utterly" without literary merit, *Memoirs v. Massachusetts*, 383 U.S. 413. The United States Court of Appeals for the Fourth Circuit upheld the United States District Court for the District of Maryland, relying upon *Mishkin v. New York*, 383 U.S. 502, contending that the material may be held obscene because it is intended for a "Clearly defined deviant sexual group" and because it was promoted by a publisher of homosexual material, relying upon *Ginsburg v. United States*, 383 U.S. 463. The testimony produced by the Respondent, at the hearing on the Motion to Dismiss in the United States District Court for the District of Maryland demonstrated that the magazines contained and promoted novel ideas; ideas of socially redeeming value and ideas which would be

of interest to homosexual and heterosexual groups of educated people. Since the Petitioner supplies literature of interest to homosexuals, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, may not a homosexual nudist magazine receive Constitutional protection as well? The homosexual is no longer to be considered a second class citizen, discriminated against because of his sexual habits and taste. If there are homosexual nudists then those homosexual nudists are entitled to receive a homosexual nudist magazine. The United States Court of Appeals for the Fourth Circuit, in its opinion answers the Petitioner's argument that we cannot allow a double standard, wherein nudist magazines containing photographs of naked females, which appeal to the prurient interest of a greater percentage of the population, are constitutionally protected yet nudist magazines predominantly appealing to homosexuals are proscribed, by declaring that nudist magazines containing photographs of naked women may also be proscribed. Petitioner alleges that any literature, regardless of the photographs it contains, may not be proscribed if those photographs are not "patently offensive", *Manual Enterprises v. Day*, 370 U.S. 478, and if the material contains socially redeeming ideas, *Roth v. United States*, 354 U.S. 476, or if the material is not "utterly" without socially redeeming value and literary merit, *Memoirs v. Massachusetts*, 383 U.S. 413. "Hellenic Sun No. II" is not hard core pornography; the photographs depict the textual material therein contained and are only repulsive to those unaccustomed to viewing the nude male figure in a photographic reproduction. Petitioner acknowledges that "Hellenic Sun No. II", is different from the average nudist magazine but it is intended for sale to a different segment of our society; a substantial percentage of our population who have a Constiutional right to receive "Hellenic Sun No. II". Thereupon this Court should declare that "Hellenic Sun Number II" is protected by the First Amend-

ment to the Constitution of the United States of America and issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

CONCLUSION

Based upon the foregoing three reasons for issuing a Writ of Certiorari herein, the Petitioner prays this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and to reverse the judgment of the United States Court of Appeals for the Fourth Circuit, and of the United States District Court for the District of Maryland, and Order the return to the Petitioners of their 56 cartons containing approximately 19,500 copies of the magazine entitled, "Hellenic Sun No. II".

Respectfully submitted:

STANLEY M. DIETZ
401 Third Street, N.W.
Washington, D. C.
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs. Civil No. 17155

56 CARTONS CONTAINING 19,500 COPIES OF A MAGAZINE ENTITLED "HELLENIC SUN"

and

POTOMAC NEWS COMPANY

vs. Civil No. 17158

J. EUGENE KENNEDY, DISTRICT DIRECTOR OF UNITED STATES CUSTOMS

ORDER

The above libel and injunction proceedings, and all motions filed therein, having been consolidated for hearing, (RCT) *Evidence having been received,* (RCT) and argument having been heard in open court by all parties after trial before the Court sitting without a jury, and the written opinion of the Court having been filed in which the Court concluded that 19 U.S.C.A. 1305 is not unconstitutional on its face and has not been applied unconstitutionally in this case, and that the magazines involved in said libel are obscene within the meaning of that section,

IT IS THEREUPON ORDERED, ADJUDGED, AND DECREED by the United States District Court for the District of Maryland this 14th day of April, 1966 that the Claimant's motion to dismiss the above libel proceeding be and it is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Government's motion to dismiss the complaint for injunction in the above injunction proceeding be and it is hereby granted;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the magazines mentioned and involved in the above libel are obscene within the meaning of the Tariff Act of 1930, as amended, 19 U.S.C.A. 1305, and are hereby condemned pursuant to that statute; and all rights, title and interest of any and all persons therein are hereby forfeited to the United States of America; and

IT IS FURTHER ORDERED that the United States Marshal in and for the District of Maryland be, and he is hereby authorized and directed to destroy said magazines on ~~May~~ *June 16th*, 1966, and that the costs of these proceedings be taxed against the claimant.

/s/ Roszel C. Thomsen
Chief Judge, United States District Court

Approved as to form:
Objected to:
/s/ Stanley Dietz
Counsel for Claimant, Potomac News Company

/s/ Thomas J. Kenney
United States Attorney

/s/ Arthur G. Murphy
First Assistant United States Attorney

/s/ Fred Kelly Grant
Assistant United States Attorney

The above Order approved as to form by the United States of America.

[Filed April 5, 1966]

MEMORANDUM OPINION

Thomas J. Kenney, United States Attorney, Arthur G. Murphy and Fred K. Grant, Assistant United States Attorneys, of Baltimore, Maryland, for libelant in No. 17155 and defendant in No. 17158.

Stanley M. Dietz, of Washington, D.C., for Potomac News Company, claimant in No. 17155 and plaintiff in No. 17158.

Thomsen, Chief Judge

Two cases have been consolidated for trial: one, a proceeding under section 305 of the Tariff Act of 1930, 19 U.S.C.A. 1305, [1] in which the government seeks forfeiture on grounds of obscenity of 19,500 copies of a magazine entitled Hellenic Sun Number Two, imported from Denmark; the other, an action by the importer to enjoin the District Director of Customs [2] from withholding the magazines. Importer contends that the material is not obscene, that section 1305 is unconstitutional because it provides for seizure before judicial scrutiny of the material, and that the procedures followed in these cases are unconstitutional because of the length of the restraint prior to such judicial scrutiny.

Procedure

Proceedings in the Instant Case. On March 4, 1966, a shipment of 56 cartons containing 19,500 copies of Hel-

1/ That section is set out in note 1 to the opinion of this Court in United States v. 392 Copies of a Magazine Entitled "Exclusive", filed April 4, 1966, ___ F. Supp. ___, referred to herein as the *Exclusive* case.

2/ Before April 1 the District Director was known as the Assistant Collector of Customs, but he was sued as the District Director and will be referred to as such herein.

lenic Sun Number Two, imported from Denmark through the Port of Entry at Baltimore, Md., consigned to custom house brokers on behalf of Potomac News Company, of Washington, D.C. (the importer), were entered as "56 ctns. books of foreign authorship, 4630 lbs., 19,500 copies". 3/ The cartons were brought by Customs' contract drayman to the Appraisers' Storehouse of the Bureau of Customs on Thursday, March 10, and were examined by "verifiers" on March 11 and by the line examiner on March 14. The line examiner refused to pass them and on the same day (March 14) referred them to the Assistant Collector of Customs at Baltimore, who examined them and referred them to the United States Attorney's office on March 16. They were seized 4/ within the meaning of 19 U.S.C.A. 1305 on that day and the importer was notified of the seizure on March 17. On March 18 the United States Attorney filed a libel about 9 a.m., the Marshal posted the attachment and monition at 12:05 p.m., and the importer's attorney (who had previously discussed the matter with the line examiner) filed its suit for an injunction about 1 p.m. On the same day the Court considered and refused importer's request for a temporary restraining order, but arranged for a prompt hearing of both cases. 5/ The cases, in-

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3/ The ship containing the material had arrived in the port of Baltimore on February 28, 1966. On March 1, the broker notified the importer of the arrival, but because of banking difficulties the material was not entered at Customs until March 4.

4/ See discussion in *United States v. One Carton Positive Motion Picture Film*, S.D. N.Y., 248 F.Supp. 373, 376 (1965), quoted in note 15 of the *Exclusive* opinion. See also *United States v. One Book Entitled "The Adventures of Father Silas", et al.*, S.D. N.Y., 249 F. Supp. 911, 913-14 (1966); *United States v. 18 Packages of Magazines*, N.D. Cal., 227 F. Supp. 198, 206, 208 (1963).

5/ On March 21, the Supreme Court decided *Mishkin v. New York*, U.S. (1966), 34 L.W. 4250, *A Book Named "John Cleland's Memoirs of a Woman of Plea-*

cluding all pending motions, were consolidated for trial, and on April 1 evidence was presented and counsel were heard.

Discussion and Conclusions. In an opinion filed on April 4, 1966, in three consolidated cases, United States v. 392 Copies of a Magazine Entitled "Exclusive", et al, ____ F. Supp. ____, this Court discussed at length the procedures followed by Customs in handling allegedly obscene publications before February 8, 1966, and the procedures followed and to be followed after that date. The Court concluded, for reasons set out in that opinion, that 19 U.S.C.A. 1305 is not unconstitutional, and had not been applied unconstitutionally in those cases. It is not necessary to repeat that discussion. Two items only need be added. First, the reorganization of the Customs Service, which is proceeding port by port and became effective in Baltimore on April 1, 1966, gives greater responsibilities to the line examiners, now called "commodity specialists". They will hereafter review all entry papers before the entry is made and will be in a position to expedite, at the request of an importer, the examination of dated magazines or other "First Amendment" material as to which any delays would be particularly costly. Second, as the suit for injunction filed in this case shows, an importer is not without remedy if he believes the decision whether or not to libel the material is being unreasonably delayed. Normally, under present procedures, the libel filed by the United States Attorney will secure a prompt judicial determination, and the Court will have power to release material pendente lite in a proper case. See discussion in the Exclusive opinion, ___ F. Supp. at ____.

The Court adheres to its conclusion that section 1305 is not unconstitutional.

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sure" ("Fanny Hill"), et al. v. Attorney General of Massachusetts, ___ U.S. ____ (1966), 34 L.W. 4236, and *Ginzburg v. United States*, ___ U.S. ____ (1966), 34 L.W. 4264.

In the instant case, the importer contends that the restraint prior to the filing of the libel was so unreasonably long as to deprive him of his constitutional rights and to prevent the forfeiture of the material if otherwise forfeitable. However, the delay of four days before March 4 (see note 3, above) was due to the importer. The time spent in getting the material from the pier to the Appraisers' Storehouse (four business days) after entry papers were filed on March 4 does seem long. The Court recognizes that Customs officials are faced with a difficult problem. Most imports are examined on the pier. Books, magazines, etc. are among the items which are customarily brought to the Appraisers' Storehouse, because they must be checked for a number of different points. Baltimore harbor's large shore area and many piers make it impossible to pick up every item on the day it is entered. Even so, the evidence of the customs inspector shows that in only three other instances in the last two years have drayage delays of more than 48 hours been encountered with respect to items which he handles. Customs must make effective efforts, including cancellation of drayage contracts if necessary, to see that the time spent before examination of books and magazines is kept as short as practicable. But it does not appear in this case that Customs was advised that there was any particular hurry; the material was entered as "56 ctns. books of foreign authorship, 4630 lbs., 19,500 copies"; the "magazines" do not bear any date, and importer's argument that one number of such a publication becomes obsolete when the next number appears is belied by the manner in which Hellenic Sun Number One and International Nudist Sun Nos. 1 to 14 are advertised in the catalogue published by importer's selling associate. After the cartons were brought to the warehouse on March 10, they were promptly moved up to the proper floor, the material was checked by the verifiers the next day, Friday, March 11, and were examined by the line examiner before 9 a.m. the next business day, Monday, March 14. The District

Director of Customs decided within two days to refer them to the United States Attorney, and he filed the libel within two days thereafter.

The Court finds and concludes that there was no unreasonable detention in this case which would bar the government from prosecuting the forfeiture proceedings. The requirements of Freedman v. Maryland, 380 U.S. 51 (1965), discussed in the Exclusive case, have been met.

Obscenity

Hellenic Sun Number Two contains 17 full page pictures of nude men, with the focus in most instances on the penis, which is flagrantly displayed, one picture of nude boys, and 13 pages of text, besides the title page. Although posed in outdoor settings, in only one or two of the pictures are the models engaged in any usual outdoor activities and the color photographs indicate that the men had been wearing trunks. The 13 pages of written material consist of three articles, entitled respectively, "The Health Powers of Sunbathing," "Past and Present Nudist Cultures" and "Nudism Can Cure Delinquency", which were evidently inserted to support the argument that the "magazine" is "the international sunbathing and nature living monthly magazine". The evidence, however, indicates clearly that it is dominantly and essentially a picture book of nude men, and that it is designed for and would be primarily disseminated to a clearly defined deviant group, namely, male homosexuals. The importer and an associate company operate a selling service, whose 1965-66 catalogue consists of some 100 pages of advertising of homosexual books and magazines, its "special interest field", including Hellenic Sun Number One and International Nudist Sun Nos. 1 to 14, and the attorney for the importer stated that Hellenic Sun Number Two would be marketed exclusively through the importer's selling service.

The controlling law is set out in Roth v. United States,

354 U.S. 476 (1957), as elaborated and in one respect "adjusted" by Mishkin v. New York, ___ U.S. ___ (1966), 34 L.W. 4250; A Book Named "John Cleland's Memoirs of a Woman of Pleasure", et al. v. Attorney General of Massachusetts, ___ U.S. ___ (1966), 34 L.W. 4236; Ginzburg v. United States, ___ U.S. ___ (1966), 34 L.W. 4264; Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); and Jacobellis v. Ohio, 378 U.S. 184 (1964).

In Memoirs v. Massachusetts (the "Fanny Hill" case), Mr. Justice Brennan said:

> "We defined obscenity in Roth in the following terms: 'Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. * * * Each of the three federal constitutional criteria is to be applied independently." ___ U.S. at ____, 34 L.W. at 4237.

(a) In Mishkin v. New York, Mr. Justice Brennan, speaking for the Court, said:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." ___ U.S. at ____.

The Court finds that the pictures in Hellenic Sun Number Two would have prurient appeal to almost all exclusively homosexual males (4% of all males, according to the testimony of Dr. Guttmacher 6/ and the Kinsey studies), to most bisexual males, i.e., men who are more homosexual than heterosexual, but are making a more or less satisfactory adjustment to life in the community (10%), and to many occasional or latent homosexuals (percentage uncertain but substantial, probably around 15%). They would have such appeal to some adolescent males; to many female adolescents they would be shocking and rather frightening but might have prurient appeal to a few. The "prurient appeal" element of the test, as elaborated in Mishkin has been met.

(b) In determining the issue of patent offensiveness, national standards should be applied in Customs cases. 7/ Most of the pictures in Hellenic Sun Number Two are essentially similar to the pictures in International Nudist Sun No. 16 and Review International No. 6, involved in the Exclusive case, which this Court found to be patently offensive. ___ F. Supp. at ____ et seq. Most of the pictures are also similar to the pictures in Hellenic Sun Number One, which was offered in evidence by the importer in the instant case, since it had not been challenged by Customs. Hellenic Sun Number One, however, was imported before the decision in Mishkin, and because its prurient appeal is primarily if not exclusively to homosexuals, its admission does not tend to prove that it is not patently offensive under the present law. Moreover, the color photographs of two men in Hellenic Sun Number Two are more offensive than any of the photographs in Hellenic Sun Number One.

6/ Chief Medical Officer of the Supreme Bench of Baltimore City and Consultant to the American Law Institue in the preparation of the Model Penal Code.

7/ *United States v. One Carton Positive Film*, S.D. N.Y., 247 F. Supp. 450, at 464 (1965); *United States v. 392 Copies of a Magazine Entitled "Exclusive", et al*, D.

The Courts finds Hellenic Sun Number Two to be patently offensive, for the reasons stated in the Exclusive case, ___ F. Supp. at ___, which need not be repeated here.

(c) The importer claims that the articles in Hellenic Sun Number Two present an idea and have some educational value and that the magazine therefore cannot be said to be utterly without redeeming social value.

The articles are not prurient or patently offensive, One, Inc. v. Oleson, 355 U.S. 371 (1958), and the fact that they promote nudism is not a ground for finding the books obscene. Sunshine Books v. Summerfield, 355 U.S. 372 (1958). On the other hand, the mere fact that the articles present an idea does not necessarily give the magazines any redeeming social value. The publication must be judged as a whole. 8/ Roth, 354 U.S. at 489.

Judged as a whole, it is clear that Hellenic Sun Number Two is essentially a picture book of nude males designed for and intended to be disseminated to male homosexuals, and that it is not a bona fide promotion of nudism. This conclusion is supported not only by an examination of the booklet itself, but also by several items of evidence. There is a striking difference between the format and pictures in Hellenic Sun Number Two and the format and pictures in the magazines considered by the Supreme Court in Sunshine Books v. Sum-

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Md., ___ F. Supp. ___, at ___ (1966). See also *Jacobellis v. Ohio*, 378 U.S. 184, at 195 (1964); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, at 488 (1962); *United States v. Ginzburg*, 3 Cir., 338 F. 2d 12, at 14 (1964), affirmed sub nom. *Ginsburg v. United States*, ___ U.S. ___ (1966), 34 L.W. 4264.

8/ To suggest an extreme example, a picture book of admittedly obscene photographs would not be protected by printing in the books the first ten Amendments to the Federal Constitution, however great the social value of those provisions may be.

merfield, which may be considered bona fide nudist magazines. 9/ The copies of Hellenic Sun Number Two cost the importer about 24¢ apiece and are sold for $5.00. It is impossible to believe that anyone would pay more than a few cents for the text, let alone $5.00. More importantly, the catalogue of homosexual material, issued by the sales associate of the importer, through which Hellenic Sun Number Two will be marketed, shows that the magazine is designed for and will be disseminated to homosexuals because of the pictures, not to persons interested in nudism as such.

As Mr. Justice Brennan pointed out in Memoirs v. Massachusetts, if a publication "has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance." ___ U.S. at ____. And in Ginzburg, speaking for the Court, Mr. Justice Brennan said that "the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality -- whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes." ___ U.S. at ____.

The Court finds that the articles in Hellenic Sun Number Two were included to support a spurious argument that it is "the international sunbathing and nature living

9/ The nudes shown in those magazines were for the most part engaged in sports and other normal outdoor activities and the focus was not on the genitalia.

monthly magazine", 10/ and that the publication, taken as a whole, is designed for and will be disseminated and traded in the market place to homosexuals on the basis of the pictures contained therein. The Court is satisfied that the Hellenic Sun Number Two is utterly without redeeming social value.

Conclusion re. Obscenity. The Court concludes that Hellenic Sun Number Two is obscene within the purview of section 305 of the Tariff Act, 19 U.S.C.A. 1305.

The Court will enter an appropriate judgment order in No. 17155, and will dismiss the injunction suit, No. 17158.

/s/ Roszel C. Thomsen
Chief Judge, U. S. District Court

10/ That claim, appearing on the title page, is identical with the claim on the title page of *International Nudist Sun No. 16* and *Review International No. 6.* See opinion in the *Exclusive* case, ___ F. Supp. at ____ (1966).

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, Libellant, by Thomas J. Kenney, United States Attorney for the District of Maryland, and Arthur G. Murphy and Fred Kelly Grant, Assistant United States Attorneys, and Stanley M. Dietz, Attorney for Libellee:

1. On March 4, 1966, a shipment of 56 cartons containing 19,500 copies of a magazine entitled "Hellenic Sun," Number Two, was imported into the United States through the Port of Entry at Baltimore, Maryland, and assigned Entry No. 16518.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,798

United States of America,
Appellee,

versus

Potomac News Co., Claimant of 56 cartons containing 19,500 copies of a magazine entitled "Hellenic Sun."
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued October 31, 1966. Decided February 16, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and CRAVEN, Circuit Judges.

Stanley M. Dietz for Appellant, and Fred Kelly Grant, Assistant United States Attorney, (Thomas J. Kenney, United States Attorney, and Arthur G. Murphy, First Assistant United States Attorney, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

An importer of an undated magazine devoted to pictures of male nudes has appealed from a judgment ordering the destruction of the magazines as obscene. He contests the constitutionality of the statute authorizing their seizure, the procedures in the Bureau of Customs and those in the District Court and the finding that the magazines were without socially redeeming value. We find no merit in any of the positions taken.

Fifty-six cartons containing 19,500 copies of "Hellenic Sun Number Two" arrived in Baltimore from Denmark, consigned to custom house brokers on behalf of Potomac News Company. They were entered on Friday, March 6, 1966, and were delivered by a contract drayman to the Appraisers' Storehouse of the Bureau of Customs in Baltimore on Thursday, March 10. They were examined successively by "verifiers," the line examiner and by the Assistant Collector of Customs at Baltimore, who referred them to the United States District Attorney in Baltimore on March 16. They were "seized" on that day, and the importer was notified of it on March 17. On March 18, 1966, the District Attorney filed a libel, and later, on the same day, the importer, whose attorney had conferred with the line examiner, filed a suit for an injunction.

The two cases were consolidated for trial. A hearing was held on April 1, 1966, and the District Court filed its opinion on April 5th and its formal judgment on April 14, 1966.

I

Prior Restraint

The importer attacks the constitutionality of the governing statute, 19 U.S.C.A. § 1305, contending that it imposes a prior restraint upon the dissemination of literature in violation of the First Amendment. This contention was rejec-

ted by the District Court largely for the reasons which the District Judge had expressed at some length one day earlier in its opinion in *United States v. 392 Copies of a Magazine Entitled "Exclusive,"* D.C. Md., 253 F. Supp. 485. There is very little that we can add to that discussion as supplemented by the District Court in its opinion in this case, [1] except to say that the statutory scheme appears to us to comply fully with the requirements of *Freedman v. Maryland*, 380 U.S. 51, as the District Court held, and to note the affirmance by the Second Circuit of one of the cases upon which the District Court relied, *United States v. One Carton Positive Motion Picture Film entitled "491,"* 2 Cir., F.2d (decided October 20, 1966). The Court of Appeals for the Second Circuit thoroughly canvassed the question in the *"491"* case. We agree with what was said by the Second Circuit in *"491"* and by the District Judge in the two cases decided by him last April.

II

Procedural Delay.

Viewed in its entirety, it cannot be said that there was any unreasonable delay. From March 4, 1966, when the cartons were entered, until April 5, 1966, when the District Court filed its formal opinion, or until April 14, 1966, when a formal order in conformity with the opinion was filed, the administrative procedures and the judicial proceedings, together, required little more than a month for a final judicial determination in the District Court of the question of obscenity, including the resolution of the related constitutional questions.

[1] United States v. 56 Cartons of a Magazine Entitled "Hellenic Sun," D.C. Md., 253 F. Supp. 498.

The answer could not have been had in so short a time had not the matter received the prompt attention of the District Court and had it not given the case great preferential treatment through the scheduling and conduct of the hearing to the filing of an opinion and the entry of the formal judgment.

Still, the importer complains of delay in the Bureau of Customs, focusing particularly on the delay from March 4, 1966, when the cartons were entered, until March 10 when they were received at the Appraisers' Storehouse. This delay of four business days, for it straddled a weekend, was due to some neglect or mistake of the contract drayman, though the District Court found that in no other instance had any delay of so long a time been attributable to the drayman.

We agree with the District Court that the Bureau of Customs is responsible for its contract draymen, and if one does not give the service that is required for the prompt processing of such materials, the Bureau of Customs must resort to other draymen or to other means to procure the drayage. It is equally true, however, that every neglect resulting in a few days delay does not abort the entire proceedings, if the procedures in the usual case are not infected with such delays and if, in the particular case, the total elapsed time required for the administrative procedures, after deleting periods of delay attributable to the importer, is not unreasonably great.

Here these materials were sent to the United States Attorney on March 16, only twelve days after their entry. While dated material of short-lived appeal or usefulness may require even more expeditious procedures, the total elapsed time from entry to the administrative determination seems sufficiently short, bearing in mind the many other questions

which customs officials must resolve in clearing incoming shipments. [2]

In the *"491"* case, the period required for administrative action, without regard to the period of delay attributable to the importer, was much longer. That case involved a motion picture film intended for commercial distribution, material which usually requires more expeditious handling than undated magazines containing pictures of undressed males, which are likely to have as much, or as little, demand six months or a year hence as they do now. But the nature of the question must also be considered, for there was a serious question as to whether the film, "491," was obscene in light of its claim to social significance. This is demonstrated by the division among the Judges of the Second Circuit on that question, and officials of the Bureau of Customs cannot be expected to reach a final administrative determination that such materials should be submitted to the District Attorney as easily or as quickly as they should decide to submit materials such as these. Twelve days is not a long time for the conclusion of all customs procedures respecting the admission of undated picture magazines and the submission of the question to the District Attorney.

We conclude that the statute contains assurance of a prompt judicial determination of the obscenity question, and that the importer clearly received it in this instance.

III

Procedures in the District Court

Contrasting with his complaint of delay in the Bureau of Customs, the importer complains that the proceedings in the District Court moved too rapidly and with insufficient

[2] See, United States v. 392 Copies of Magazine Entitled "Exclusive," D.C. Md., 253 F. Supp. 485, fn. 13 and accompanying text.

notice to him. He asserts a denial of a right to trial by jury in violation of the Seventh Amendment and denial of the right of trial in violation of the Fifth.

After the Government filed its libel on March 18, 1966 and the importer its complaint, the importer answered the libel raising the questions of the constitutionality of § 1305, facially and as applied, and denying that the magazines were obscene. It also filed a motion to dismiss, raising substantially the same questions. Conversely, the Government filed an answer and a motion to dismiss the importer's complaint seeking injunctive relief.

The importer now asserts that it was under the impression that the hearing held on April 1, 1966 was limited to the disposition of the motions to dismiss. Had it understood that there was going to be a trial on the merits, it asserts, it might have arranged for the presence of expert witnesses who would have been of assistance to it on the issue of obscenity. It might also have demanded a jury trial, for though it recognizes that the Government proceeding was in rem, § 1305 contemplates a jury trial of the question of obscenity when one is demanded. We need not consider the question of the right, under these circumstances, to a trial by jury of the obscenity issue, for we think the record clearly shows that there was a trial on the merits to the Court, by consent, on April 1, 1966.

At the opening of the hearing on April 1, the Court made reference to the fact that there were two separate cases and to the pleadings which had been filed in each. It inquired if counsel wished to "dispose of everything today," to which the attorney for the importer responded that he saw no reason why they should not. At that time the lawyer might have been thinking of the two motions to dismiss in the two separate cases consolidated for the hearing, but, thereafter, there was reference to a stipulation of facts

which reserved the right of both parties to offer additional testimony, and the Court inquired about the importer's damage claim in its complaint. Counsel disclaimed any reliance upon the damage claim, whereupon the Court expressed the opinion that the damage issue could not be disposed of that day, but, if that claim was not being seriously asserted, it appeared essentially a case for an injunction.

Thereafter the Government proceeded to offer witnesses. A psychiatrist testified at some length regarding the prurient appeal of the magazine and the class of persons who would find them titillating. Two officers of the Bureau of Customs also testified. These witnesses were cross-examined extensively by the lawyer for the importer with no objection and without the slightest suggestion that he was not prepared for a full trial on the merits that day. At the conclusion of the trial, he referred to his efforts to rush the proceedings to a conclusion, his interest in the Court's decision and the effect the guidelines which the Court would lay down would have upon the subsequent importation of similar magazines. Even when the importer's lawyer had received a copy of the District Court's opinion on the merits and a proposed formal order was submitted to him for his approval of its form, he voiced no objection; the first reference to this contention is in his brief in this Court.

If it could be said, therefore, that the lawyer might have been under some misapprehension when the proceedings opened that the Court was going to hear that day only the legal issues arising out of the motions to dismiss, that impression could not have survived the subsequent colloquies between Court and counsel. Surely, when the Government offered all of its evidence on the merits and the lawyer for the importer thoroughly cross-examined the Government's witnesses, he could not then have been under the impression that the hearing on the merits was reserved for a later date. If he had initially been under the impression

that the hearing on April 1 would be restricted to the issues arising out of the motions to dismiss, it became incumbent upon him, when it became perfectly apparent that the trial on the merits was being had, to protest and inform the Court that he was not prepared for the presentation of his case on the merits on that day. After full participation in the trial without any suggestion of any earlier misapprehension, with no request for a continuance or for an opportunity to offer additional testimony at a later date, the importer is no longer in a position to assert any misunderstanding under which it may have labored in the opening moments of the proceedings. When it became unmistakably apparent that the proceedings were a trial on the merits, the importer could not silently acquiesce in a submission of all the issues, reserving the right when the judgment went against him to assert any earlier misapprehension about the extent of the hearing to be conducted on April 1.

We conclude, therefore, there was no violation of any of the importer's Fifth Amendment rights, for a full trial was afforded him on April 1, 1966. Nor was there any denial of a Seventh Amendment right to a jury trial of the obscenity issue, for there was no demand for a jury. On the contrary, there was clearly a cooperative attempt by the Court and by counsel for both parties to attain a full submission of all issues to the Court as early as practicable and a prompt resolution of them by the Court. Procedurally, the importer received from the Court exactly what it sought.

IV

Obscenity

The magazine "Hellenic Sun Number Two" is a collection of photographs of undressed men. Some are in color. There is one of a group of boys. They are posed in the out of-doors, but the generally languid models are not engaged

in outdoor activity. In the composition of the photographs, the genitals of the models are made the focal points of the pictures. The camera's interest is languished upon the penis, and, if the general pose of each model be languid, the penis in some of the pictures appears not in complete repose.

The pictures have no apparent artistic value. They have no semblance of the qualities of Michelangelo's David. Raw in the extreme, and with no redeeming attribute, the normal male, if Dr. Kinsey will permit us to retain a belief there is such a thing, can view them only with revulsion.

The late Dr. Manfred A. Guttmacher, the well-known psychiatrist of Baltimore, was a witness for the government. He testified that the pictures would have a prurient appeal for a large proportion of male homosexuals, particularly juvenile males with homosexual tendencies. The one picture of the boys would have a prurient appeal for paedophiles. Adolescent girls would find them frightening as well as shocking, but with some exceptions, mature women would find little stimulation in such material.

Other evidence was introduced which indicated that the importer intended to distribute the magazine among male homosexuals. They cost the importer approximately 24 cents each, but it expected to sell them to members of that deviant sexual group for a very substantial $5.00 a copy.

On this showing and for the reasons carefully discussed by the District Court, we unhesitatingly affirm its conclusion that these magazines are obscene. An examination of the material, reinforced by the evidence of its prurient appeal to homosexuals[3] and of the importer's promotional

[3] See Mishkin v. New York, 383 U.S. 502.

material for the exploitation of that deviant group,[4] leads inescapably to that conclusion.[5]

In this Court, the importer attacks the finding of obscenity on two grounds which require mention.

First, it is said, that this is a homosexual nudist magazine; if nudist magazines may be circulated among heretosexual people,[6] nudist magazines featuring and appealing to homosexuals may not be suppressed by heterosexual censors, even judicial ones. The argument's premise has no foundation, however, for pictures of females as obscenely displayed, intended for circulation among heterosexual males, are equally suppressible.[7] *Mishkin*, of course, forecloses any contention that the material may not be held obscene because it has prurient appeal only to "a clearly defined deviant sexual group."

Next, it is said, that a finding of obscenity is foreclosed by the presence of three "dreary and puerile"[8] articles dealing, generally, with nudism. The articles are inoffensive in themselves, and they are not wholly unrelated to pictures of naked men in outdoor settings. The insertion of innocuous material, however, cannot cloak pornography with immunity or obscure the fact that the magazine was designed and intended for the commercial exploitation of the pruri-

[4] See Ginzburg v. United States, 383 U.S. 463.

[5] See, also, Jacobellis v. Ohio, 378 U.S. 184, Manual Enterprises, Inc. v. Day, 370 U.S. 478, Roth v. United States, 354 U.S. 476.

[6] See Sunshine Book Co. v. Summerfield, 355 U.S. 372.

[7] See our opinion in the *Exclusive* case, decided this day. United States v. Claimant of 392 Copies of a Magazine Entitled "Exclusive", 4 Cir. F.2d .

[8] The District Judge's description of similar material in the *Exclusive* case.

ent interest of male homosexuals. Fillers do not change the character of the publication or lend to it, as a whole, a redeeming social value to which it has no other claim.

This magazine is no "Memoirs of a Woman of Pleasure," which has some claim to literary merit.[9] It is no "491," which has some claim of a serious, albeit realistic, contribution to the problem of juvenile delinquents and their treatment.[10] Viewed as a whole, with its article fillers, it is a picture magazine appealing to the prurient interest of homosexuals, intended to stimulate that interest and having no substantial potential market outside that deviant group.[11]

We find no merit in any of the contentions made on appeal.

Affirmed.

[9] See, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413.

[10] See United States v. One Carton Positive Motion Picture Film Entitled "491", 2 Cir., F.2d (decided October 20, 1966).

[11] Roth v. United States, 354 U.S. 476, requires us to look at the magazine as a whole. The insertion of the innocuous articles into this picture magazine achieves no alteration of the view. It is still a collection of pictures of naked men with an excessive interest in the genitalia and excessive accent upon them.

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265-801—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1394

POTOMAC NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A13–A23) is reported at 373 F. 2d 635. The opinion of the district court (Pet. A3–A12) is reported at 253 F. Supp. 498.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administrative and judicial scheme authorized by Congress in 19 U.S.C. 1305(a) for res-

olution of the question whether material sought to be imported into the United States is obscene, is unconstitutional either on its face or as applied in the instant case.

2. Whether the courts below properly found that the magazine sought to be imported was obscene.

3. Whether petitioner abandoned his preliminary demand for a jury trial.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the

United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

On Friday, March 4, 1966, 56 cartons containing 19,500 copies of a magazine entitled "Hellenic Sun No. II," imported by petitioner from Denmark, arrived at the port of entry at Baltimore, Maryland. On Thursday, March 10, a drayman, under contract with the Customs' service, transported the cartons from the pier to the Bureau of Customs Appraisers' storehouse (Tr. 61-63).[1] The following day, "verifiers" completed their check of the number of maga-

[1] "Tr." refers to the transcript of the evidentiary hearing before the district court.

zines in each carton and informed the "Line Examiner" that the cartons were ready for his examination. At 8:45 a.m. on Monday, March 14, the next working day, the Line Examiner inspected the magazines and found them to be obscene (Tr. 101–102, 118). He referred them to the Assistant Collector of Customs at Baltimore. On March 16, the Assistant Collector informed the United States Attorney for the District of Maryland that the magazines had been seized as obscene (Tr. 103, 106–107). On March 17, the importer was notified of the seizure.[3]

On March 18, at about 9:00 a.m., the United States commenced a libel action for forfeiture of the magazines in the United States District Court for the District of Maryland. Later that same day, petitioner's attorney (who had not yet learned of the institution of the libel) filed a complaint in that same court seeking an injunction against the Bureau of Customs. The district judge denied petitioner's request for a temporary restraining order but issued a show-cause order returnable on April 7. On March 24, petitioner moved to dismiss the libel on the grounds that 19 U.S.C. 1305(a)—the federal statute authorizing the seizure—was unconstitutional and that the magazines were not obscene. The government thereupon filed a motion to dismiss the complaint for injunctive relief. On April 1, the cases were consolidated and an evidentiary hearing was held. On April 5, the district judge issued an opinion sustaining the constitutionality of

[3] On March 15 petitioner's attorney had telephoned the Assistant Collector of Customs to complain of the Bureau's delay in releasing the magazines (Tr. 119).

the statute, both generally and as applied in this case, and found the magazines obscene. On April 14 the court issued its formal order decreeing destruction of the magazines (Pet. A1–A2). The court of appeals affirmed (Pet. A–23).

ARGUMENT

1. There is no substance to petitioner's contention that the procedures adopted by Congress in 19 U.S.C. 1305(a) for determining the obscenity of material sought to be imported into this country violate the First Amendment prohibition against prior restraint. Nor is there any merit to petitioner's more particularized claim that these procedures, as applied in the instant case, resulted in an unconstitutional delay in resolving the obscenity issue.

a. The validity of initial detention of questionable material by Customs authorities is hardly open to question in light of the broad congressional power to regulate the importation of material and goods from foreign sources and the numerous regulatory purposes that detention serves. See, *e.g.*, *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490–491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4).

The statutory authorization of administrative detention is merely for a temporary period, preliminary to a prompt judicial determination of the question whether the seized material is obscene. The seizure and forfeiture provisions of the statute are not rendered invalid because Congress did not fix exact time limits for

the implementation of the administrative and judicial proceedings. The statute provides, in terms, that "[u]pon the seizure" of a publication thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Under a companion statute, 19 U.S.C. 1604, the United States Attorney is required to commence proceedings "without delay" for forfeiture of the material provided he believes it to be obscene. The statute thus contemplates swift administrative action (see *United States* v. *One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911, 918 (S.D. N.Y.); the *"Exclusive"* case, *supra*, 253 F. Supp. at 490–492) and consequent judicial dispatch consonant with a sound resolution of the question of obscenity (see *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d at 898–900). As pointed out by the Second Circuit in the *"491"* case (*id.* at 899), the legislative history of the statute, as well as its language, indicates that Congress intended that the issue of obscenity "'be quickly submitted to the district attorney and to the court for determination.' 72 Cong. Rec. 5422 (1930)." Similarly, see the *"Father Silas"* case, 249 F. Supp. at 916–918. In short, this Customs statute meets the requirement announced by this Court in *Freedman* v. *Maryland*, 380 U.S. 51, 59, that "[a]ny restraint imposed in advance of a final judicial determination on the merits must * * * be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; see also

Manual Enterprises v. Day, 370 U.S. 478, 514-515 (concurring opinion by Mr. Justice Brennan).

3. There was no unreasonable delay in implementing the statutory scheme in this case. Less than one month elapsed from the date of entry of the goods (March 4, 1966) to the judicial hearing on the merits (April 1, 1966). The final determination was made four days after the hearing. This is hardly an unreasonable delay in view of the sensitivity of the issue being resolved and the many different purposes for which imported goods must be examined. *United States v. 392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490-491 (D. Md.).

The sole period of apparently unjustified delay—two working days—was caused by the neglect of the drayman in transporting the magazines from the pier to the storehouse. Although required by the terms of his contract to perform this service in two days (Tr. 61-62, 72), in this instance the drayman took four.[1] But this short delay did not prejudice petitioner. The magazines are not dated and the passage of time would not affect their appeal nor render them "stale". As the district judge noted, although the magazine was

[1] The total period was six days (March 4-10), of which two were over a weekend. There was testimony that this was only the third time in two years that the drayman had failed to perform his services in time. Moreover, there is good reason to suppose that, in accord with the suggestion of both courts below, the Customs authorities at the port of Baltimore will take steps to prevent a repetition. The sensitivity to judicial criticism in this regard is evidenced by the prompt revamping of the administrative procedures following the ruling in the "Fuller Silks" case, 229 F. Supp. 911 (S.D.N.Y.) that prior administrative procedures were unduly time-consuming.

out of a series, it would not become obsolete or unsalable upon appearance of the following issue. (Pet. App. 7). Petitioner, moreover, did not inquire about the delay in Customs until March 15, the day before the Bureau completed its administrative examination. After this, the proceedings moved with considerable dispatch, culminating some two and a half weeks later in a judicial finding of obscenity.

The question of the obscenity of the materials was determined in strict accordance with the standards approved by this Court. The bulk of the publication (17 pages) contains photographs of nude males—in one instance a group of nude young boys—in outdoor surroundings. The focus of the pictures is most often the genital area. The remainder of the magazine consists of three articles (13 pages) entitled respectively "The Health Powers of Sunbathing," "Past and Present Nudist Cultures," and "Nudism Can Cure Delinquency." The late Dr. Manfred Guttmacher, formerly Chief Medical Officer of the Supreme Bench of Baltimore City, testified for the government at the hearing in the district court that the magazine has a prurient appeal for homosexual males and also, with respect to the one photograph of children, to a certain group of pedophiles (Tr. 32–33, 39, 41, 44). Petitioner introduced no evidence on these issues.

Based on Dr. Guttmacher's testimony and their own review of the magazine, both courts below found that the dominant appeal of the publication was to the prurient interests of a "clearly defined deviant sexual group" (*Roth v. New York*, 363 U.S. 302, 508);

that the magazine was "patently offensive" (*Memoirs v. Massachusetts*, 383 U.S. 413, 418), and that it was "utterly without redeeming social value" (*"Memoirs"*, 383 U.S. at 419). These determinations have a substantial basis. The male subjects of the photographs are not engaged in normal outdoor activities, but are shown in stationary, posed positions. As the court of appeals characterized the photographs, "[t]he camera's interest is languished upon the penis * * *" (Pet. A21).

The inclusion of articles on the history and benefits of nudism do not save the magazine from condemnation. While these articles are inoffensive and "not wholly unrelated" (Pet. A22) to the photographs, it is apparent that they are merely "fillers". As the court of appeals noted, they should not "obscure the fact that the magazine was designed and intended for the commercial exploitation of the prurient interest of male homosexuals" (Pet. A22-A23). This conclusion is underscored not only by the extremely high sales price ($5.00) of the publication (which actually costs the importer 24 cents), but also by the intended mode of advertisement of the magazines, as evidenced by the "catalogue of homosexual material" (as the district judge described it, Pet. A11) prepared by the prospective distributor.[4]

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[4] Reference to this catalogue is also made earlier in the district court's opinion (Pet. A7), where the court noted that "[t]he importer and an associate company operate a selling service, whose 1968-69 catalogue consists of some 100 pages of advertising of homosexual books and magazines, its 'special interest field' * * *." We are lodging a copy of this catalogue with the Clerk of this Court. A copy of the magazine is already on file with the Clerk.

3. Section 1355(a) (*supra*, pp. 2-3) provides that "any party in interest" may demand a jury trial on "the facts at issue." Petitioner argues that he was denied that right although he demanded it in his answer to the government's libel filed on March 24, 1966.

This argument overlooks the course of events as they developed at the hearing before the district court. At the outset of the April 1 hearing petitioner's counsel was asked by the court: "Do you want to dispose of everything today?" Counsel replied: "There is no reason why not, your honor" (Tr. 3). Thereafter, the government put on its witnesses, including Dr. Guttmacher, who testified on the issue of obscenity of the magazine. The government's witnesses were subjected to cross-examination by petitioner's counsel (see *e.g.*, Tr. 33-60). Consistent with his then-expressed desire for a speedy judicial resolution, counsel for petitioner at no point objected to the continuation of the proceedings without a jury; nor did he renew his demand for a jury trial. At the close of the evidence, he argued the issue of obscenity before the judge (Tr. 134-137). Accordingly, even if not aware earlier in the proceedings on April 1, petitioner's counsel must have realized, when the government called Dr. Guttmacher to the stand and commenced its examination concerning the purient appeal of the magazine, that the hearing was not being restricted to the cross-motions to dismiss, but would also cover the question of obscenity (see Pet. App. A19-A20). By participating in the

proceedings without objection, counsel obviously chose to withdraw his original demand for a jury.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] Petitioner phrases his jury trial claim in this forfeiture action, instituted by a libel *in rem*, as though it were required by the Seventh Amendment (Pet. 9–11). This is a debatable proposition, however, since it has long been held that the Seventh Amendment does not require jury trials in admiralty cases (*e.g.*, *Waring* v. *Clarke*, 5 How. 441, 460), and would depend primarily on the characterization of the locus of the seizure as within or without admiralty jurisdiction (see *The Sarah*, 8 Wheat. 391, 394; *445 Cans of Egg Product* v. *United States*, 226 U.S. 172). In any event, even if petitioner had such a right, as pointed out above, his counsel effectively waived this right, whether constitutional or statutory, at the hearing before the district court. See F.R. Civ. P., Rule 38(d).